NADARAJAN MUNIANDY

v.

AYOB JAUHARI

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL APPEAL NO: 12-239-2000]
27 JULY 2001

ROAD TRAFFIC: *Negligence - Road accident - Liability - Whether liability decided on plaintiff's evidence in the absence of defendant's evidence - Whether plaintiff contributory negligent*

TORT: *Negligence - Contributory negligence - Road accident - Whether plaintiff's contributory negligence could be ascertained from his own evidence*

CIVIL PROCEDURE: *Damages - Loss of actual earnings - Failure to make a proper claim to employer - Whether claim should be dismissed*

The plaintiff's claim against the defendant for damages as a result of a road accident was dismissed in the sessions court. The sessions judge, however, assessed damages. The plaintiff now appealed to this court against the dismissal of his claim. His appeal against quantum was confined only to the refusal of the sessions judge to award actual loss of earnings.

Held:

[1] Since the defendant did not adduce evidence and as the onus of proof of negligence on the part of the defendant rested with the plaintiff, the court was left to decide the issue of liability based on the plaintiff's evidence. In the circumstances, the court had no doubt of the defendant's negligence. However, that did not mean that the defendant had to give evidence before the court could find the plaintiff contributory negligent. His contribution, if any, could be ascertained from his own evidence. (p 720 d-e)

[1a] In *Lai Yew Seong v. Chan Kim Sang*, the then Supreme Court held that negligence as used in the expression "contributory negligence" does not mean breach of duty. It means the failure of a person to use reasonable care for his own safety or with regard to his own property so that he becomes the author of his own wrong. The test of contributory negligence is based entirely on the conduct of the

plaintiff in the particular case. Having considered the plaintiff's evidence, the court was of the view that the plaintiff was to a large extent guilty of contributory negligence. (pp 720 f & 721 b)

[2] It was not in dispute that the plaintiff was absent from work for nine months and that he was not paid his monthly salary for the nine months. With regard to this claim, the plaintiff's employer testified that since the accident the plaintiff never returned to work nor did he submit his medical certificate. The employer further testified that had the plaintiff furnished his medical certificate, he would have been paid the salary according to the insurance policy taken out to cover his employees. It followed that as the plaintiff failed to make a proper claim from his employer in respect of his nine months' loss of earnings, that claim was therefore rejected. (p 721 c-e)

[Liability apportioned at 30% against defendant and 70% against plaintiff; appeal against quantum dismissed.]

Case(s) referred to:
Lai Yew Seong v. Chan Kim Sang [1987] 1 CLJ 351; [1987] CLJ (Rep) 151 ***(foll)***

For the plaintiff/appellant - DP Rajah; M/s Rajah & Co
For the defendant/respondent - Munawir Abdul Aziz; M/s Lim Kean Siew & Co

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:
This is a simple running down case. The learned judge of the Sessions Court, Penang, having heard the evidence dismissed the plaintiff's claim but assessed damages. The plaintif has since appealed against the dismissal of the claim. His complaint in respect of quantum was confined only to the refusal of the court to award actual loss of earnings.

Facts
The pleaded case of the plaintiff was that he was riding his motorcycle PCW 3576 from the direction of Bagan Luar towards Kampong Gajah along Jalan Kampong Gajah, Butterworth. When he reached a junction on his right a motor lorry WMB 2826 driven by the defendant and proceeding in the same direction suddenly turned towards this junction and thus caused the collision. Unfortunately the defendant did not testify and the only evidence led was by the plaintiff and the investigating officer of the case.

In his police report lodged more than one-and-a-half months after the accident the plaintiff said as follows:

Apabila sampai di jalan Kg. Gajah masa itu hujan, tiba-tiba sebuah m/lori WEM 2826 dari arah yang sama menghimpit m/sikal saya dan masuk di hadapan saya. Saya tak sempat membrek dan terlanggar.

Findings Of The Court

According to the investigating officer the front off-side bumper of the lorry was dented whilst the front head light of the motorcycle was broken. In his evidence-in-chief the plaintiff said that the motorlorry was on the left edge of the road and before he could overtake, the lorry swerved to the right. He tried to brake and at the same time tried to overtake the lorry but was unable to do so. He could not say if the lorry had stopped or had given any signal before it turned. Under cross-examination he confirmed that at the material time his speed was between 60 - 70 k.m.p.h.

Since the defendant did not adduce evidence and as the onus of proof of negligence on the part of the defendant rested with the plaintiff, the court was left to decide the issue of liability based on the plaintiff's evidence. As the court was bereft of the benefit of hearing the defendant's version the evidence of the plaintiff that the defendant was turning right must be accepted. In the circumstances the court had no doubt of the defendant's negligence in cutting across the path of following traffic. However it does not mean that the defendant has to give evidence before the court can find the plaintif contributory to his own negligence. His contribution if any can be ascertained from his own evidence.

In *Lai Yew Seong v. Chan Kim Sang* [1987] 1 CLJ 351; [1987] CLJ (Rep) 151 the then Supreme Court held that negligence as used in the expression "contributory negligence" does not mean breach of duty. It means the failure of a person to use reasonable care for his own safety or with regard to his own property so that he becomes the author of his own wrong. The test of contributory negligence is based entirely on the conduct of the plaintiff in the particular case. Although the facts in *Lai Yew Seong* were almost similar to the facts of the case before me, but in *Lai Yew Seong* the defendant gave evidence. In this case the plaintiff admitted that the defendant's vehicle was on its left edge of the road. When the lorry swerved to the right he tried to brake and at the same time he attempted to overtake the lorry. Now to my mind this is indeed a foolish act. To attempt to overtake a lorry which was already turning across his path was nothing more than a suicidal act. This act of attempting to overtake the lorry no doubt caused the front of his motorcycle to collide into the front right hand side bumper of the lorry. Besides it is also reckless to overtake at a junction. Considering the fact that he was riding at a speed of about

60 - 70 k.m.p.h. at about the time he braked, his attempt to overtake the lorry which was turning across his path, was setting the scene for an imminent collision.

Having considered his evidence and in the absence of the defendant's evidence, I was of the view that whilst the defendant was indeed negligent in cutting across to the right, the plaintiff was to a large extent guilty of contributory negligence. I therefore set aside the decision of the Sessions Court which dismissed the plaintiff's claim, and apportioned liability at 30% against the defendant and 70% against the plaintiff.

Quantum

There was no dispute with regard to the award of damages except that the Sessions Court did not allow the plaintiff's claim of nine months actual loss of earnings. It is not in dispute that the plaintiff was absent from work for nine months and that he was not paid his monthly salary of RM541 for the nine months. With regard to this claim, the plaintiff's employer testified that since the accident the plaintiff never returned to work nor did he submit the medical certificate to them. The employer further testified that had the plaintiff furnished them with his medical certificate the management would have paid the salary according to the insurance policy taken out to cover the employees. In my view this claim for nine months' loss of earning was totally unclaimable. Since the plaintiff himself failed to make a proper claim from his employer, I therefore rejected this claim.

Since the plaintiff failed in his appeal against quantum and only succeeded on liability I ordered each party to pay its own costs of the appeal except that the plaintiff was entitled to the lower court costs. I also ordered the normal interest rates to apply.